

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

FILED
BILLINGS DIV.

2011 JUN 13 AM 11 52

PATRICK E. DUFFY, CLERK

JAMES B. COX,

Plaintiff,

vs.

YELLOWSTONE COUNTY,

Defendant.

CV-10-65-BLG-REC-CSO

DEPUTY CLERK

**ORDER ADOPTING FINDINGS
AND RECOMMENDATIONS OF
U.S. MAGISTRATE JUDGE**

On April 26, 2011, United States Magistrate Judge Carolyn Ostby entered Findings and Recommendations (*Doc. 44*) in this case. Judge Ostby recommended that Defendant Yellowstone County's (County) Motion for Summary Judgment (*Doc. 30*) be denied. Judge Ostby concluded that the County's application of Montana's agisters' lien statute, codified at Mont. Code Ann. § 71-3-1203, resulted in an unconstitutional denial of Plaintiff's right to due process of law provided by the Fourteenth Amendment of the Constitution of the United States.

Upon service of a magistrate judge's findings and recommendation, a party has 10 days to file written objections. 28 U.S.C. § 636(b)(1). In this case, the County filed an objection on May 11, 2010 (*Doc. 45*). Plaintiff filed no response.

The County's objection requires this Court to make a *de novo* determination of those portions of the Findings and Recommendations to which objection is made. 28 U.S.C. § 636(b)(1). In this case however, the County states that it "does not object to the recommendation by the magistrate judge." (*Doc. 45, p. 2*). Rather, the County seeks clarification as to whether the Findings and Recommendations would render Montana's agisters' lien statute unconstitutional as applied or as written. See *Id.* The County goes on to request that the Court make a finding that the statute is unconstitutional as written.

The Court does not take a request to find a state statute unconstitutional lightly. Nevertheless, after reviewing *de novo* Judge Ostby's well reasoned Findings and Recommendations, and considering established precedent, the Court agrees with the County and can conceive of no set of circumstances under which Montana's agisters' lien statute could pass constitutional muster in view of procedural due process requirements. Particularly, the need to provide a meaningful opportunity to be heard prior to a government deprivation of property.

After reviewing the record and the applicable law, **IT IS HEREBY ORDERED** that Judge Ostby's Findings and Recommendations are adopted in their entirety and the County's Motion for Summary Judgment (*Doc. 30*) is **DENIED**. Pursuant to Fed.R.Civ.P. 56(f)(1) summary judgment is entered in

favor of Plaintiff. Furthermore, for the reasons articulated in the Findings and Recommendations, the Court finds that the enforcement provision of Montana's agisters' lien statute, Mont Code Ann. § 71-3-1203, is unconstitutional as written.

The Clerk of Court is directed to notify the parties of the making of this Order, enter judgment in favor of Plaintiff and close this case.

DATED the 13 day of June, 2011.



RICHARD F. CEBULL
CHIEF U. S. DISTRICT JUDGE